

1
2 UNITED STATES OF AMERICA
3 FEDERAL TRADE COMMISSION
4
5
6

7 THE FEDERAL TRADE COMMISSION AT 100
8
9
10

11 Thursday, September 18, 2008

12 3:30 p.m. to 5:30 p.m.
13
14

15 At the:

16 Hilton Lac-Leamy

17 Kreighoff Room

18 3, Boulevard du Gatineau

19 Gatineau, Quebec, Canada
20
21
22
23

24 Reported and transcribed by Lillian C. Purdy, C.S.R.
25

P R O C E E D I N G S

- - - - -

CHAIRMAN KOVACIC: On behalf of Russ and Mark and all of us at the FTC, I want to thank all of you again for doing this. Let me mention the two most important reasons that we sought you out. The first is you are particularly astute observers of what we do. You have followed what we do for a long time; you have studied it from a variety of different angles; and you have studied it in the context, often, of seeing us not simply in our interactions with Canada, its authorities, and its companies, but truly in a global setting; how we work in international organizations, how we work outside of North America. You know us well; that is one major reason.

The second is that we have, as part of this assessment that we're trying to do for ourselves, a particularly keen interest in talking to those from jurisdictions that we think have been real leaders in terms of thought, organization and policy development. It is clear to me, in my lifetime in working in this area, that the Canadian bar, its intellectual infrastructure in the universities, its economists, its consulting community, its policy-making process has had an extraordinary influence on the formulation of policy

1 internationally. I guess if you were boxers, you would
2 punch way above your weight if simply measured by
3 population and, in that respect, you are also especially
4 well positioned to give us advice about what to do.

5 Our aim in this exercise is how to get better,
6 how to improve. We are interested, in part, in things
7 that you think we do well but, I guess most important, in
8 things that we don't do so well or, more neutrally,
9 things that we could certainly do better. If you were in
10 my position, if you were in Russell's position or Marc's
11 position, and you were thinking in particular: How do we
12 work in matters involving international policy more
13 effectively? Where might we invest more resources in
14 working with other institutions? What features of our
15 own process could be improved in dealing with
16 transactions that you're familiar with through your own
17 work?

18 If you were thinking about how to take steps,
19 some of which cannot unfold immediately, to improve the
20 way we work, what would you tell us? You will do us the
21 greatest favor if you are as direct and unsympathetic in
22 your assessment as you could possibly be, because that is
23 how we expect to improve.

24 As you know, in the agenda of things that you
25 have looked at there are five broad questions that we are

1 asking ourselves. We are wondering how you do measure
2 effectiveness and success of an agency, that is, what are
3 the criteria that do that; how we can best go about
4 setting our own policy agenda with enforcement and
5 non-enforcement tools; how well you see us doing so far
6 in conducting our existing programs; and, maybe most
7 interesting for our conversation, how should we set
8 priorities for our international work, matters involving
9 cross-border commerce. How do you assess the work we
10 have done internationally, both bilaterally with Canada,
11 with other countries and multi-national organizations?
12 How can we do that kind of work better?

13 We want your thoughts about that larger menu
14 but, without necessarily channeling you in one direction
15 or another, I really welcome your thoughts about any of
16 those that you would like to jump in on and pick to
17 start.

18 MR. CRAMPTON: We are not necessarily going in
19 the order of the questions?

20 CHAIRMAN KOVACIC: Not necessarily.

21 MR. CRAMPTON: I will jump in. The stuff
22 that's most interesting to me these days, and you and I
23 talked a little bit about that down in St.
24 Andrews-by-the-Sea -- and I think it might fit into the
25 third area that you have of the five -- is the political

1 front, and it keeps getting brought home to me in spades.
2 Even last night as I was winding down I flipped on the TV
3 and I saw the leader of one of Canada's major political
4 parties talking about price gouging and the need to
5 strengthen the Competition Act. You have seen the same
6 type of thing down in the U.S. We are seeing it in
7 gasoline. I think you mentioned that it is not
8 inconceivable that you could see it in drugs and it is
9 not inconceivable that, if agricultural commodity prices
10 had continued to go the way they were going in the summer
11 for a while, you might see it there.

12 I really think that there is a huge challenge
13 for certainly the more sophisticated competition
14 authorities, indeed all of them, to figure out how to
15 reach out to the people who are in the political
16 community, people who are in a position to pass laws and
17 pass very bad laws and do some real damage to our
18 antitrust laws, to build a bridge to that community so
19 that their ears are open when you then speak, and try to
20 get them to better understand how markets work and what
21 the consequences of their actions might be.

22 I welcome others here to jump in. There is a
23 real danger there. We have seen it in Canada where there
24 have been a large number of private member's bills, and
25 even government bills, that have proposed changes to the

1 Competition Act up here that would have been very
2 draconian. This includes proposed legislation that was
3 on the books when the recent election was called, so it
4 died on the Order Paper. This legislation had
5 bi-partisan support in the Industry Committee. It didn't
6 have support of the minority government, but had support
7 of three of the major political parties in this country.
8 Among other things, it proposed to expand our abuse of
9 dominance provisions to capture exploitative conduct.

10 That is one example that is very recent, but
11 there are other examples, in Canada and elsewhere, and we
12 need to get out in front of this. That is the first
13 thing.

14 MR. BODRUG: I agree. The big question in my
15 mind is how you do that.

16 MR. CRAMPTON: It is a challenge.

17 MR. BODRUG: When I got this invitation, one
18 important thing I thought I would like to endorse is the
19 ex post analysis and studies that Luke Froeb had
20 spearheaded while he was at the FTC. I think that is a
21 great initiative, and I think the way he put it, when I
22 heard him speak, was if you cannot answer the question of
23 what is the effect of all the enforcement action that we
24 are either doing or not doing in the antitrust area, then
25 why are we doing it?

1 I recall that some of the analysis was in the
2 oil and gas sector to study markets where no action had
3 been taken and concluding that there was not an
4 anti-competitive effect from a particular merger. That
5 is an example of a useful ex post analysis. Another
6 example, which I think is harder, would be to study cases
7 where there has actually been a merger subject to
8 negotiated or imposed remedies, and then trying to
9 measure whether the remedy was effective or not. There
10 are a lot of measurement difficulties, and even then, I
11 think, is hard to translate the results back to the
12 legislators. However, at least such studies give you a
13 tool, or something to work with, rather than just making
14 abstract comments.

15 MS. SANDERSON: In some ways, I think what
16 we're talking about is education, in essence, and we do
17 have a tendency to speak to ourselves in our own
18 community quite often. I suppose one potential side
19 benefit that would come from advocacy-related activities
20 that you were speaking about over the lunch hour is that
21 in fact you do extend the group of people to whom you are
22 then speaking to in the context of some of the
23 principles; what are the things that actually one is
24 hoping to achieve with competition laws and
25 administration, and then giving people a sense of what --

1 a lot of it is kind of "markets work." It's quite basic
2 in some respects. And then these kinds of ex post
3 studies or other types of market studies can be used to
4 actually demonstrate that -- you can show that markets do
5 work in these contexts. Probably that can get extended
6 beyond just sort of what politicians put out into the
7 broader market.

8 I guess the person that always spoke to the
9 press the most is Allan Fels in Australia, who was
10 renowned for -- in some ways he got negative press, in
11 the sense that people thought he was sometimes a little
12 too much out in the front, so to speak, but on the other
13 hand he was an educator on these principles that you are
14 speaking to, Paul.

15 MR. CRAMPTON: We used him when I was over at
16 the OECD; not him personally, but we used the example of
17 what he accomplished in terms of building public
18 awareness of his mandate, the law that he was enforcing
19 and even how markets work.

20 As I'm listening to the two of you speak I am
21 having a further thought and wondering whether it is
22 really in the area of highly concentrated commodity
23 markets, like gasoline, where you get these highly
24 parallel price swings, and people who don't understand
25 markets, who can predict when prices are going to go up

1 and not going to go up like, in the case of gasoline, on
2 a Friday night or in the hot summer months, and start
3 suspecting that there has to be something going on,
4 because they don't understand how markets work.

5 I feel that we are vulnerable as an antitrust
6 community in that area, and unless we do something I can
7 see legislation, either specific price gouging
8 legislation, as you have seen down in the U.S., or
9 draconian amendments to our competition laws that would
10 have implications for other industries.

11 In our particular case, because the feds do not
12 have constitutional authority to legislate in a
13 particular industry, the proposed legislation about which
14 I spoke a moment ago, which was really directed towards
15 gasoline, had to be couched in general terms that would
16 have applied to the whole economy. So that proposal
17 presented a huge risk.

18 MR. GOLDMAN: Can I go back to some broader
19 aspects, perhaps taking it away from gasoline. I would
20 rather come back to the broader questions that you asked,
21 and I thought the order made sense: What criteria and
22 techniques ought to be used to measure the success of a
23 competition agency? I would like to look at that coupled
24 with the second question, setting its enforcement agenda
25 and so on.

1 I have been at it, like so many others here,
2 both from the public sector side and the private sector
3 side, over many years. When I look at the criteria that
4 ought to be considered in evaluating the success of a
5 competition authority, these are the ones that come to
6 mind: First and foremost, the degree of professionalism
7 coupled with objectivity and fairness in bringing
8 responsible cases forward; bringing them before the court
9 in our system, or tribunal. But whichever process we're
10 going to talk about, the FTC, administrative law or the
11 judicial process, bringing forward cases that are the
12 subject of challenge in a professional, objective, fair
13 and responsible manner keeps the agency a subject of
14 respect. Whether the case is won or lost, process
15 fairness is critical to maintaining that respect in all
16 usual quarters, the ones that count, at least in my view.

17 Number two, I think the criteria enveloped by
18 openness and transparency in the decisions that are made
19 by the authority, those are very important, coupled with
20 accountability and explanations for those decisions. As
21 a side bar to that, when I was in office -- I've told
22 this story probably too many times -- I decided that it
23 made sense to not only explain on the public record those
24 cases where we were challenging but, in high profile
25 matters, reasons why we decided in the end not to

1 challenge the matter, with a backgrounder coupled with a
2 shorter news release for those that wanted to delve into
3 it.

4 I had cautions from my counterparts in the
5 United States, in particular, who warned against ever
6 doing something like that because you may find litigation
7 over the reasons for not challenging the fact we
8 proceeded, and it is nice to see more of that taking
9 place in some quarters now, explanations on both sides.

10 Number three is the effectiveness of the
11 relationships between the antitrust authority or
12 authorities and other government authorities, especially
13 those in overlapping sectors, be it telecom,
14 transportation, energy and so on. It is critically
15 important, in my view, looking at not just our
16 jurisdictions, Canada and the United States, but evolving
17 jurisdictions -- and China is but one that you will know
18 quite well -- to try to avoid unnecessary duplication and
19 decisions that may be at odds, in whole or in part,
20 different processes and uncertainties that result from
21 parallel government bodies looking at similar conduct or
22 the same transaction. Ameliorating those differences and
23 uncertainties is a sign of great success that an
24 authority should recognize. It is very important to
25 investors and business communities and stakeholders at

1 large.

2 Number four is the degree to which, in my view,
3 in this era of increasing globalization, the agency is
4 applying accepted international norms in its own
5 backyard. Many of us have been involved in the ICN, OECD
6 and elsewhere preaching and conveying what we think ought
7 to be international standards, but a reflection of
8 whether we are indeed doing everything that we are
9 suggesting to others is an important yardstick. And, if
10 so, maintaining the flip side -- that is my number 4 --
11 is international leadership; sharing experiences. Are we
12 applying the norms? Can we do better there? Can we
13 share our experiences internationally to help others move
14 toward what I hope would be a converging set of standards
15 in both process and substance. International leadership
16 to bring about convergence in process and substance is my
17 4(b) -- two sides of 4, the international side.

18 Number 5, and I will leave it at that, is the
19 need to vigilantly strive for constant improvement, and
20 constant improvement cuts across the entire realm of the
21 four and probably others that ought to be in that list.
22 Striving for constant improvement, in my view, is not
23 just a goal that private sector entities should adhere
24 to; public sector should also, and public sector, because
25 of the breadth of responsibility, should, in my view, do

1 so through various vehicles, including a broad
2 consultative process, just as you are doing today,
3 consultative fora which we did when we were in office
4 involving various stakeholders that are brought to the
5 organization, or times we would go to them to seek input,
6 again not just from within but from without, as you are
7 attempting to do here.

8 This cuts into your second topic, and then I
9 will be quiet for a while. The consultative process
10 should include your agenda. Do you have the right
11 agenda, as you see it; the priorities within that agenda;
12 issues of substance and process that others believe ought
13 to be considered; and how you can consult more
14 effectively, because none of us have all the answers,
15 even to the consultative process. Those answers are
16 available, to the extent you can get that dialogue going,
17 if people are asked. I have yet to see invitations to
18 that by an authority not welcomed by various stakeholder
19 groups, so they should be broad and they should go right
20 to the heart of what you are trying to achieve.

21 Those are some thoughts on number 1 and number
22 2.

23 CHAIRMAN KOVACIC: Going back to Paul's
24 original query, maybe to start from the very beginning
25 would have been a useful frame rather than saying, "Pick

1 from the menu."

2 Maybe to take Cal's list in talking about what,
3 in a general way, should be the way that we measure
4 success, that is, what is the essence of a successful
5 agency, things you would add or like to elaborate from
6 Cal's list.

7 MR. KENNISH: If I could take a slightly
8 different tack on this, I'd like to focus on what I think
9 you do well. I know that that is a question that is on
10 your agenda. It is not exactly the question you have
11 asked us, but I will declare I am a big fan of the FTC
12 and your track record is very, very admirable.

13 I think it is instructive as to what you have
14 accomplished. I have been thinking about these areas. I
15 am not a consumer protection lawyer so I am not as
16 familiar with your activities in that area, although I am
17 quite an interested observer.

18 The first point I would make is the FTC does a
19 very good and efficient job in merger review in
20 separating out the very limited number of cases that you
21 identify for in depth review and, more importantly, allow
22 the balance of the cases, which in 2007 was over 97
23 percent of the total -- not maybe in your agency, but
24 overall -- to get cleared within the 30 days or less. I
25 think that is a major accomplishment, and of course you

1 have had a lot of experience to do that.

2 Your decision making always seems to be well
3 informed by economics, and I know you have a great pool
4 of economists within your organization, but it is
5 particularly evident when you issue statements in regard
6 to matters that you have dealt with in your agency.

7 I am not as familiar with this, but we have
8 looked at your governance model. You seem to have
9 successfully combined the functions of investigation and
10 enforcement, on the one hand, with administrative
11 adjudication responsibility in a way that has not aroused
12 extensive fears of prejudice or bias or those kind of
13 perceptions. It is a model we have looked at in Canada
14 from time to time and wondered whether our system was the
15 best, but that is certainly working for you.

16 Another point: my impression is that you are
17 the international leader in consumer protection and you
18 have taken initiative with countries such as Canada and
19 other countries to work together in a very active,
20 rigorous program of detecting and preventing
21 international consumer fraud, and I think that is a major
22 accomplishment.

23 Also, and this is something you share in common
24 with the DOJ, you have successfully interpreted a very
25 broadly-worded statute, your own statute, but then the

1 other competition and antitrust laws that you enforce or
2 administer also have substantially wide scope, and I
3 think you have shown wisdom in toning down the
4 enforcement of statutes that, although historically still
5 exist, are not as well supported by current economic
6 thinking such as the Robinson-Patman Act.

7 You have been an independent voice of reason
8 when public and congressional groups have agitated for
9 reform of industries where they have a misconception
10 about the way the competition world works. We have
11 already had a discussion about that.

12 I think you have been very innovative over the
13 years in regard to a variety of matters such as, as has
14 been mentioned, merger retrospectives, the review of
15 merger remedies, the publication of statements explaining
16 the rationale for cases you didn't take.

17 Was the Cruise Line merger an FTC --

18 CHAIRMAN KOVACIC: Yes.

19 MR. KENNISH: That is a good example --
20 particularly in tough calls, as both agencies are doing
21 this. The do-not-call registry, which we are about to
22 implement here. Having individual and joint hearings on
23 subjects that are tough ones in the antitrust field, such
24 as IP and competitor collaboration; that is not, I think,
25 something we have done here. I thought it would be a

1 good idea. I certainly think it is helpful, and it has
2 led to guidance being published on those subjects
3 informed by what you have received from those
4 consultations.

5 You have established workshops, industry
6 research reports. You have done public advocacy as a
7 result of what you have learned, and you have made a
8 significant contribution to important work of the ICN. I
9 know that you have dedicated senior people in your
10 organization to that cause, and I think everybody here
11 agrees it is very valuable. Your work in regard to
12 consumer education; things that the public ought to know
13 about what the bad guys out there may have in mind, to
14 protect themselves on a self-help basis.

15 I also have a list of cons, but I think I will
16 just leave it here with the positives at this point.

17 MR. WINERMAN: You're allowed to give the cons.

18 CHAIRMAN KOVACIC: We welcome those.

19 MR. KENNISH: They are more institutional and
20 they are not specifically related to just the FTC, so I
21 don't know whether you want to hear about this or not.

22 CHAIRMAN KOVACIC: Yes, please.

23 MR. KENNISH: My principal reservations relate
24 more to things about structure of the U.S. antitrust
25 system.

1 CHAIRMAN KOVACIC: These are relevant issues
2 for us.

3 MR. KENNISH: Not specifically with respect to
4 you. I am also obliged to say that I recognize -- I
5 don't think there is any political way this can be
6 reformed, so maybe it is shouting in the breeze. There
7 is a real problem, I think, in having two national
8 enforcement agencies with largely concurrent civil
9 jurisdictions dealing with much of the same subject
10 matter, a situation which is obviously further
11 exacerbated by having 50 state attorneys general having
12 legislation in the form of many antitrust statutes who
13 are inclined to pile on the very same cases that you guys
14 get involved with. That is not a crisis at all, but
15 these are issues that, from a foreign perspective, make
16 dealing with the United States in the antitrust area more
17 complicated than maybe in a way it has to be.

18 There is an issue around efficiency. I imagine
19 you have looked at this, and I am certainly not in a
20 position to comment. It is just that it does seem to be
21 inefficient to have two rather than one, but the bigger
22 problem is -- and you try to avoid this, I know -- is
23 that there are inevitably differences in policy and
24 enforcement approach that emerge from the tacks that the
25 agencies take on the same subjects, the most recent

1 example being the DOJ's paper on section 2, independent
2 unilateral conduct. And then there are differences, I
3 guess, long-standing differences, in the way in which you
4 actually look at remedies in merger cases there, and so
5 on.

6 In merger cases, again, you have another
7 problem, which I do not think is soluble. You tried to
8 fix it a couple of years ago, but without success, and
9 that is the interagency clearance regime which can -- I
10 do not have personal experience with this, but I
11 understand can, on occasion, consume valuable time in the
12 course of the 30-day waiting period in arm wrestling
13 about who is going to get the case for review.

14 I am also given to understand that depending on
15 who gets the case can make a difference from the point of
16 view of both the prospects of the case being tipped for
17 further in depth review and/or if a remedy is required,
18 or thought to be required, the type of process you have
19 to go through to satisfy the agency who has it.

20 I guess because those overlaps and the
21 uncertainty about how the cases would be resolved, that
22 creates some impediments to the kind of perfect results
23 you would like to have.

24 That is my main point, and it is not specific
25 to you.

1 CHAIRMAN KOVACIC: That is real helpful. Other
2 thoughts?

3 MR. BALDANZA: I will just offer some thoughts
4 from purely a Canadian perspective. I do not have
5 special insight into the American system other than
6 regular encounters on merger matters, et cetera.

7 It seems to me that the criteria as to how you
8 measure success, et cetera, really depend on what you are
9 measuring, whether it is the advocacy role or the
10 enforcement role, and they are, in my mind, very separate
11 in many ways. Indeed, and perhaps you are aware are of
12 this, but in the recently published report of the
13 Competition Policy Review Panel in Canada there is a
14 suggestion of separating the advocacy role from the
15 enforcement role, in part because the advocacy role may
16 conflict with the enforcement role or cause the focus in
17 enforcement to be lost. Now, I am not necessarily an
18 advocate of that, but I think it does highlight that
19 there are different attributes for each that result in
20 success or failure.

21 In terms of the advocacy part, clearly
22 communicating an understanding of the law to the
23 population at large is critical. Achieving buy-in in
24 Canada, and again I am focusing on a Canadian prism,
25 there is not necessarily a culture of competition here,

1 and it seems to me that if you were measuring the
2 Competition Bureau's advocacy efforts, you would be
3 looking at how successfully it has informed the Canadian
4 public of the benefits of competition and the necessity
5 of it, et cetera, the thinking behind it.

6 Then at the end of the day you want to ensure
7 that the advocacy authority, the advocacy agency, is
8 ensuring that the legislators have the very best thinking
9 when they are developing their legislation so that the
10 law evolves in a way that reflects developments in
11 economic thinking. That, to my mind, is the advocacy
12 role.

13 On the enforcement I have much more of a black
14 letter law perspective. Ultimately it seems to me you
15 need the courage to enforce, and I am not sure we in
16 Canada always see that. I heard your speech at lunch
17 about trees and low-hanging fruit. It seems to me when
18 you enforce you are actually planting a tree in many
19 cases, because there is a demonstration effect.

20 I recall chatting with a client, providing some
21 guidance on a matter, and the client said, "But doesn't
22 the Competition Bureau simply give speeches?" That was
23 the reaction I got. In other words, there was not the
24 credibility of enforcement behind the words.

25 I am not suggesting, by the way, that was a

1 completely fair comment, but the fact that the client, a
2 senior, experienced executive, would have that
3 perspective is noteworthy. Incidentally, in Whole Foods
4 I think you demonstrated courage.

5 As well, that cases be brought fairly,
6 consistently, professionally, the criteria that Cal
7 articulated earlier.

8 The final point I would mention is that -- and
9 here I am a little torn, but at the end of the day
10 Parliament in Canada has spoken when it reduces laws to
11 writing and they are passed. I sometimes wonder whether
12 it is actually the province of the agency, in our case
13 the Competition Bureau, to undermine the law by deciding
14 this is not really state-of-the-art thinking and
15 therefore I am not going to devote any resources to it.
16 It is simply an issue that I think merits some
17 reflection, and we see that in some areas, like your
18 Robinson-Patman, where our price discrimination law is,
19 probably quite sensibly, very under-enforced. Is that
20 the right way to go about it? Parliament has spoken and
21 that word is being ignored.

22 CHAIRMAN KOVACIC: Yes.

23 MS. SANDERSON: I would say I disagree slightly
24 with what Tony was saying in that, at least the initial
25 premise, but I may have misunderstood what he meant

1 between thinking of advocacy and enforcement as very
2 separate and quite different. I think of them as they
3 are two different tools by which ultimately one is trying
4 to achieve the same final goal. If you take the health
5 care analogy between inputs and outputs, but really what
6 we are interested in is outcomes; how long do people live
7 and how healthy are they for that period of time -- the
8 outcome. In essence, we never really state it, but the
9 overarching goal in all of this is are we providing
10 consumers with the lowest quality adjusted prices we can
11 and the greatest selection of choice and the incentives
12 for innovation and so on.

13 We can think of enforcement activities and
14 advocacy activities as different means by which to get
15 there. Of course, the problem always is measurement. As
16 you were saying, how do we know that we could not do this
17 in a better way, or are we really giving people the best
18 possible option, and that is where I think comparative
19 related studies are extremely valuable.

20 It is a little easier if you imagine a
21 situation where you have an immediate choice in front of
22 you. I remember Howard Wetston, when he was
23 commissioner, saying that if he could change
24 interprovincial trade barriers in respect of industrial
25 milk, that would go a long way to giving consumers better

1 prices across the country than dealing with 10 different
2 dairy mergers.

3 In the United States it is a different
4 environment; there is less regulation, so sometimes
5 perhaps those advocacy-type choices or the state aid
6 level initiatives and so on that the European Commission
7 or we in Canada could pursue in a more productive way do
8 not surface to the same extent. But you can almost
9 imagine that if your overarching goal is to make
10 consumers better off, then at any particular decision
11 point you might think, "But for my intervention, would
12 they be worse off?" Then, "Given that I am going to
13 intervene, how do I get the most bang for my buck in
14 terms of the policy tool that I choose?"

15 I do agree with Tony that enforcement action is
16 necessary as a signal for general and specific
17 deterrence, and it sends a signal that -- the fact that
18 those guys in the U.K. were sent off to jail is going to
19 send a quite a signal in terms of leading to a better
20 outcome overall.

21 MR. CRAMPTON: While we are still on topic
22 number 1 of your list, I completely agree with what
23 Margaret was just saying, and maybe would couch it in a
24 slightly different way in terms of your question of how
25 to measure the success. Contribution to people's

1 increased standard of living; are you contributing to
2 that? There are different ways, as you said. The two
3 principal measurement categories would be advocacy
4 activities and case activities.

5 Backing up before that, I would ask: does the
6 agency have the confidence of the public, for example,
7 the various stakeholders, the business community, the
8 general public, the legal community, the government, the
9 civil service? I think it is very important to have the
10 confidence of these constituencies. How do you get that?
11 Are you seen to be effectively promoting competition?
12 Are you seen to be focusing on the right things? Are you
13 staying out in front of the issues? I think the FTC is
14 focusing on the right things. The FTC in spades is an
15 international beacon for staying out in front of the
16 issues and thinking about what issues are coming down the
17 pike and trying to get a handle on them, bringing and
18 winning the right case, standing up to the government
19 where necessary. I think that is how you build the
20 confidence of the public.

21 You need to have the confidence of, and
22 influence within, the government. I would say that is
23 another measure of an agency's success. Do you have
24 influence with the government; do you have the confidence
25 of the government? If you don't have the confidence of

1 the government, if you don't have influence within the
2 government, you are not going to be as successful.

3 You say, how do you measure whether an agency
4 has the confidence of the government? Well, is it
5 getting adequately resourced; is it being provided with
6 necessary enforcement powers and tools; are they being
7 provided with opportunities to input into other
8 government policies? If the answers to those things are
9 yes, then it has the confidence of the government.

10 In terms of international influence; I cannot
11 think of an agency that has greater international
12 influence.

13 MS. SANDERSON: You really have to realize
14 that. You are the model. I went down to Washington. So
15 many people come into Washington. I think the technical
16 assistance and the efforts that you do with other
17 agencies around the world is just fabulous.

18 MR. CRAMPTON: It's fabulous. It's best in
19 class.

20 MS. SANDERSON: It is.

21 MR. CRAMPTON: There are not three; there is
22 one, and it's you guys.

23 CHAIRMAN KOVACIC: I do want to come back to
24 the question of how we better engage looking ahead with
25 international organizations with our counterparts

1 overseas, what we might add to the mix of what we do now,
2 what we have to do differently to improve. How can we
3 expand the positive influence that comes from
4 participation in international affairs?

5 MR. CRAMPTON: It is not just participation.
6 It is also the way that you participate. I know when I
7 was at the OECD, I noticed that FTC representative always
8 had a very nice way of making some difficult points.
9 Typically the face of the FTC is a friendly face, it is a
10 very diplomatic face, and therefore has an awful lot of
11 influence, has an awful lot of goodwill because of the
12 way it delivers tough messages. I would encourage you to
13 do more of that.

14 In terms of what should you focus on
15 internationally, that comes back to your agency
16 priorities, because your international priorities have to
17 be a function of your agency priorities rather than just
18 sort of saying, well this is interesting, that is
19 interesting. I know you don't do that, but I think you
20 have to go back to your priorities as an agency.

21 These days I perceive you to have a priority in
22 the areas of consumer protection and Internet fraud,
23 identity theft. Those are all cutting edge issues that I
24 would encourage you to continue to do more work on. I
25 perceive you to have a priority on single-firm conduct.

1 That is an area where the world needs leadership, and the
2 U.S. has been providing leadership. Obviously having an
3 internal disagreement between the two principal agencies
4 undermines, to some degree, your ability to provide that
5 leadership because people could say you don't even agree
6 amongst yourself.

7 CHAIRMAN KOVACIC: The group agreed generally
8 that last week was a bad week for the U.S. system because
9 there was such a decided split on that issue.

10 MR. CRAMPTON: But, you know, it is broader
11 than that.

12 MR. KENNISH: And the stock market.

13 CHAIRMAN KOVACIC: I guess we could come up
14 with a list of life's real tragedies, and it might not
15 fit in the top five.

16 Tim observed that we do have a multiplicity of
17 actors in the public sphere. They do not always agree.
18 Sometimes they disagree vehemently. How much does that
19 get in the way of having effective participation in
20 international discussions?

21 MS. SANDERSON: To some extent it is hard to
22 know because it also reveals a willingness to have an
23 open debate and discussion. One thing that happens in
24 Canada, because our bar is primarily a defense bar, I
25 don't know to the extent that we really have the same

1 level of open discussion that would exist perhaps in the
2 United States on some of these issues. Maybe we do.

3 On the one hand, I say it does mean that there
4 is a willingness to debate these issues. Of course, it
5 might be better to have debated them behind closed doors.

6 CHAIRMAN KOVACIC: That happened too.

7 MS. SANDERSON: I am sure it did. I don't know
8 internationally will it -- Paul might have a better sense
9 of that from the OECD experience.

10 MR. CRAMPTON: It is never good any time you
11 have two agencies responsible for the same thing. We had
12 the same problem back when the National Transportation
13 Agency had jurisdiction, and Parliament has just given it
14 jurisdiction again over transportation mergers. In one
15 well-known case, the CAST/CP merger, the agency came out
16 and said there wasn't an issue, after looking at all the
17 exact same issues as the Competition Bureau, which said
18 the opposite.

19 It never reflects well on you internationally
20 when you have two different agencies that reach different
21 conclusions on the same matter. As Tim alluded, we see
22 that in a bunch of areas within the merger field. There
23 is test for injunction, the approach to Crown jewel
24 provisions, the requirement for an upfront buyer, the
25 requirement to "fix it first", whether to hold separate,

1 and even the intervention threshold itself. I think
2 there are people who think that XM/Sirius and Whole Foods
3 Wild Oats would have been decided differently by the
4 other agency.

5 Any time you have two agencies, obviously you
6 get scope for such difference and the challenge is to
7 figure out how to keep those disagreements to a minimum
8 and how to present a unified face to the public even
9 though you may have disagreements behind the scenes.

10 CHAIRMAN KOVACIC: Can I use mergers as an
11 example? If you are just to think about this from your
12 experiences in counseling parties to transactions and
13 your experience from your time in the public sector as
14 well, how do we know if an agency has merger policy in
15 the right place? I have two co-authors who have done a
16 paper that says we don't, and they use a number of ways
17 to come at it. They say one way you know is that you
18 look at historical rates of activity and whether those
19 historical rates of activity have gone up or gone down,
20 that is, whether current activity by a particular set of
21 leaders has gone up or down by comparison to the
22 historical baseline. Of course, that raises the
23 question, is the historical baseline the good one.

24 Another observation they have is, aha, I have
25 an informing example here, it is Maytag Whirlpool, and

1 that let's you peer into the soul of the Department of
2 Justice and tell you whether they made the right call or
3 the wrong call. Yet, my experience in looking at mergers
4 from the outside and the inside is there are lots of
5 judgments that one makes. So a question is, how do you
6 know if it is in the right place? How do you tell?

7 MS. SANDERSON: Empirically you would always go
8 at this to say: Well, I need the control. What is the
9 controlled experiment? So in the context of, if I have
10 too little merger activity I should see higher prices
11 here than would exist if they were more vigilant.
12 Sometimes you can see that internationally, but it is
13 pretty hard to find what that comparison is.

14 The other part that is hard is, let's say you
15 had a lot of merger -- let's say you had more than you
16 needed, so you ended up with prices just as low as they
17 would be otherwise, except now you have imposed all this
18 additional cost on the merging firms and the rest of the
19 system. Again that is very hard to know how much cost is
20 standard.

21 The only thing I can think of is international
22 comparisons or, as you say, a comparison that might be
23 back in time. Or at the end of the day you have to do it
24 on a specific basis. Obviously if you do the specific
25 case, you can look at it and say: Did Evanston, that

1 hospital merger, lead to higher prices? It looks like we
2 should have done more than we did. I think that is one
3 of the great values in the specific case reviews and the
4 ex post type reviews. I don't know if you'll ever know
5 what the answer is.

6 MR. CRAMPTON: A barometer could be the extent
7 to which people writing about you not having it in the
8 right place increases or decreases. If you get a blip in
9 a given three- or four- or five-year period where all of
10 a sudden everybody is writing about how you must have
11 shadow guidelines, which happened at one point -- I think
12 it might have been in the 1980s -- or people are writing
13 about how merger enforcement has been abandoned, and you
14 see a trend, you see a definite blip in public feedback
15 or academic feedback or legal community feedback that
16 these guys are not following their own guidelines here or
17 they're not enforcing the law as we in our antitrust
18 community would expect them to be, that could be one
19 measure of whether you have got it in the right place.

20 MR. GOLDMAN: I will give you another
21 suggestion -- actually two -- building in part of what
22 Paul is referring to, back to those affected by a merger.

23 A famous judge once said, I know what it is
24 when I see it. You know, when there are a lot of third
25 parties complaining and raising issues, that if there is

1 enough smoke there may be a real fire at hand. Members
2 of the public, purchasers right through to competitors
3 and others affected, will generally speak up with
4 sufficient volume in a manner to alert you to the fact
5 that there is something that ought to be taken a look at,
6 period. That is not indicative of all cases, but it
7 certainly is indicative of the more egregious ones, prima
8 facie, that some authority ought to be examining.

9 Similarly, after the fact, if there are
10 complaints about pricing, squeezing and market power in a
11 particular market, it may be indicative that you missed
12 -- you, any authority -- may have missed or not gone far
13 enough, as opposed to learned commentaries, entities --
14 and we don't have in Canada quite the consumer groups we
15 used to have, the number and so on -- but bodies do
16 complain. So that is one yardstick. Those are the more
17 extreme, but it happens.

18 The second is the view of those looking to
19 invest or do transactions. You also, I think, as an
20 authority, need to constantly be cognizant of not
21 unnecessarily impeding market dynamics that would
22 otherwise unfold. There, two factors appear critical:
23 Time and certainty. Certainty of process and the time it
24 takes to get through it. By "process" I mean the
25 criteria that are going to be applied that are known in

1 advance so that decision makers and planners have a fair
2 picture of what they are to evaluate against and can
3 execute against, and the time frame.

4 Mergers are a completely different animal than
5 other areas of antitrust conduct -- completely different
6 and need to be recognized as such. They are
7 exceptionally time sensitive. You can kill a merger, in
8 most instances, other than, for example, Whole Foods
9 which was allowed to close, or in Canada we get some
10 closings in escrow. But most do not have the luxury of
11 time to litigate other than on an immediate injunctive
12 type of basis. Most, especially public entities, cannot
13 be held in limbo for the same period of time that an
14 entity being attacked for monopoly or being attacked for
15 other kinds of conduct certainly can afford to litigate.

16 So time and certainty of rules and process
17 criteria are critically important, and I think it is
18 incumbent upon the antitrust authority to do everything
19 it possibly can to reach an informed decision in as short
20 a time frame as possible. There is no luxury of time in
21 merger review or you may chill what may be otherwise
22 pro-competitive behavior.

23 MR. DAMTOFT: I just want to follow up with Cal
24 on one thing. At the outset you gave a pretty good list
25 of criteria, and that was certainly one of them that will

1 fit into that. How would you actually grade us? There
2 is a report card form. How would you assess us against
3 those criteria?

4 MR. GOLDMAN: I am actually going to largely
5 duck that because I look at the FTC decisions through the
6 eyes of my U.S. counterparts. I spend a great deal of
7 time on U.S.-Canada transactions, a great deal of time on
8 policy with the FTC. I do not think I am fairly in a
9 position to speak to -- I do not have a horse directly in
10 the race; I am outside. I will speak to the policy side,
11 but not the case enforcement side. I do not know that I
12 want to wade into that.

13 On the policy side, I think the FTC, especially
14 in recent years -- and I wanted to say this -- the
15 Pitofsky years followed by the ICN leadership that has
16 occurred and the Kovacic general counsel touring
17 supplement to it all, all of it very important, put the
18 three of them -- the global hearings, which showed
19 international openness, constant improvement led by a man
20 who is regarded as an icon in antitrust worldwide, by Bob
21 Pitofsky, that helped put the FTC on the international
22 map.

23 I don't say it because you are in the room,
24 Bill, or you are chair, but your travels as general
25 counsel over three years or so to many jurisdictions were

1 exceptional and also helped put the FTC interest in newly
2 industrialized agencies front and centre.

3 Then, third, is the fine work that Randy, Liz
4 and others, but Randy especially deserves a commendation
5 hear. He certainly deserves some credit for what he did
6 with the merger working group and now the unilateral
7 conduct working group at the ICN.

8 The one twist, the one rider vis- -vis the FTC
9 is this, at OECD and elsewhere, and if I've got this
10 right -- I think I do, but correct me if I am wrong --
11 the leadership internationally normally is held by the
12 executive branch.

13 CHAIRMAN KOVACIC: Yes.

14 MR. GOLDMAN: And therefore it is the Assistant
15 Attorney General -- I heard this from Jim Rill and
16 others, having been there with him, that that is the
17 repository of leadership when the President defers to the
18 representative of the executive branch and the Attorney
19 General's office. So the FTC is not always in a position
20 to exercise the kind of front and centre unilateral
21 leadership that it might otherwise have referred to it as
22 an independent agency and authority, and it is hard to
23 therefore make a complete call on the international
24 front. Therefore, I point to these three initiatives as
25 examples of where the FTC itself, which is the context I

1 wanted to put it in, has stood out front and centre.

2 MR. KENNISH: I want to go back to your
3 question of whether last week was a bad week. I think it
4 was pretty bad because I think there is a difference
5 between the type of cases you might take and what the
6 results are. We may or may not have a sense of whether
7 the other agency would do something different, but this
8 is a guideline essentially, what the DOJ has published,
9 and I know that you have responded to it, but you are
10 almost obliged to explain yourselves in a counterpart
11 statement just exactly where you differ in your views.
12 This is really going to create some uncertainty because,
13 unlike the merger situation, it is not just going to be
14 one of you; two of you could go after it.

15 So that is a pretty unusual situation and very
16 regrettable. It undermines some very successful
17 collaboration that has gone on between the two agencies.
18 You have the long history with the merger guidelines, you
19 have the joint collaboration guidelines and you have IP
20 guidelines and you have --

21 CHAIRMAN KOVACIC: You could call these the
22 non-collaboration guidelines.

23 MR. KENNISH: I don't want to overdo it, but I
24 do think it is a worrisome development, and if you are
25 thinking about how you look from the outside, you might

1 compromise a bit on some issues just to get agreement and
2 then hope that over time you can get to a good place.

3 MR. CRAMPTON: Back to mergers, in terms of
4 constructive comments, back at the time of ICPAC I
5 suggested, and I still think this is true, that the U.S.
6 "Second Request" approach is excessive. It imposes an
7 excessive burden on your businesses, which I think has
8 adverse implications at the margin for your
9 competitiveness. I think there are deals that just don't
10 go ahead in the U.S. that would go ahead in jurisdictions
11 that, let's face it, let's be frank and let's look at the
12 real politic of the situation, are your competitors.

13 Similar companies in other trading blocs are
14 being allowed to do things that companies in the U.S. I
15 think are chilled from doing because of this excessively
16 burdensome system. I'm talking about those few cases
17 where you are not in the 97 per cent that David Meyer
18 talked about this morning, but you are into the 1300
19 boxes of documents, you're into the paralyzing of the
20 business, and we have had clients that have been caught
21 by them, so I have actually experienced this.

22 CHAIRMAN KOVACIC: More and more it's into the
23 20 little wafers.

24 MR. CRAMPTON: Gigabytes, yes, and the
25 horrendous negotiations about custodians and data sites

1 and all that. So I really perceive, coming from a
2 jurisdiction where I don't think there is a perception
3 that we've got many type 2 errors, that we have allowed
4 too many anti-competitive mergers to go through, that the
5 U.S. second request approach imposes an excessive burden
6 on your companies. Other agencies that don't appear to
7 be committing type 2 errors are able to do their job with
8 far less information, and therefore by imposing a far
9 lesser burden on their companies and on the nationals of
10 other jurisdictions. That is one message.

11 Secondly, there is another area where I think
12 none of us do well. No agency anywhere in the world is
13 doing particularly well in the area of litigation. I
14 think everybody has got mixed results. In fact, ours are
15 probably not even mixed, they're generally not good.

16 MS. SANDERSON: On the merger side, you mean?

17 MR. CRAMPTON: In Canada on the merger front.
18 To the extent that you were going to invest resources in
19 figuring out how you can do things better, mergers is one
20 the three key pillars of the pillars of antitrust --
21 horizontal cartels, mergers and single firm conduct. The
22 agencies uniformly are not doing well in the merger
23 litigation area in Europe and Canada, in the U.S. At
24 best, they're having mixed results.

25 What is going on; I think I read something that

1 you wrote recently, or maybe it was one of your
2 interviews, that indicated you are looking at this. I
3 think it is something that needs to be looked at, because
4 it ties back into the public confidence and confidence
5 with government. Are these guys bringing the right
6 cases? If so, why are they losing?

7 MS. SANDERSON: I guess maybe a cheaper way to
8 get to the same outcome; one possibility may be to survey
9 the business community. You don't want to go into Wall
10 Street right now, but essentially the financiers are the
11 guys that will, when they're putting deals together and
12 financing together, they're certainly thinking about
13 antitrust issues in the context of figuring out. So to
14 go to Paul's question about how do you know if you are --
15 do you actually know if you are chilling -- how much are
16 you chilling or are you chilling? You would have to more
17 or less --

18 MR. KENNISH: Margaret, I can't think of a case
19 -- I appreciate that we don't have these burdensome
20 requirements, but even in the cases involving the U.S. -
21 where parties have been deterred because of the
22 information burden, it is the prospects of being held up
23 or stopped where people have put down their oars and
24 quit. I don't think it is information overload that is
25 preventing that.

1 MS. SANDERSON: I tend to believe, and maybe
2 because I think if there is anything in Canada, we are
3 probably under-enforcing. That is probably our issue as
4 opposed to over-enforcing. I don't have a very good feel
5 for to what extent you actually hear complaints about a
6 lot of what Paul was talking about in terms of chilling
7 transactions and there are a lot of transactions that
8 would have proceeded but people get legal advice that
9 they can't possibly do it.

10 CHAIRMAN KOVACIC: It is very hard to tell in
11 any way that is systematic rather than just completely
12 idiosyncratic. It is hard to tell, although the larger
13 theme about the way that Cal divided the world and you
14 can say, "Have you got it right," with respect to
15 substantive outcomes on the one hand, and "Have you got
16 it right," with respect to process. I would say on
17 process, with respect to matters that are examined -- put
18 aside the bulk that are not, things that are early
19 terminated, things that go through fast -- I do not hear
20 a lot of good things about the U.S. system with respect
21 to the information demands, with respect to the process
22 itself, the clearance on certainty in some places. I
23 think that is a major area for --

24 MS. SANDERSON: There have been improvements,
25 though, have there not, in the sense of things like early

1 in the stage -- I don't know to what extent the FTC, for
2 example, has the processes the Justice Department has
3 where the economists write an issues-in memo and it has
4 to be within two weeks of the economist assigned to the
5 merger, four weeks -- and that is supposed to narrow the
6 set of issues upon which the information will then be
7 gathered.

8 CHAIRMAN KOVACIC: I think a difficult question
9 for both places is to ask how well that works in the
10 routine transaction. My rough sense is that every chair
11 of the Federal Trade Commission, every head of the Bureau
12 of Competition, going back at least to Janet Steiger's
13 time in the late 1980s, has taken a swing at that pitch.
14 Measures to seek improvements are announced with great
15 fanfare and then there is another one and another one and
16 another one, and knowing which really make the difference
17 and how you overcome the tremendous sense that somewhere
18 there is a powerful piece of paper, or now an electron,
19 out there that is going to determine the success of the
20 case, and the worst thing that can happen to me is to
21 miss it and not ask for it, as opposed to doing the
22 shortcut. I think it remains just an enormously
23 difficult issue for us, but from a comparative
24 perspective, when I step back and look at what other
25 jurisdictions do, I think there must be a way in which

1 one can achieve suitable outcomes without the
2 informational demands.

3 MS. SANDERSON: You have to remember the cost
4 -- I guess part of it in the tradeoff analysis is never
5 to forget the costs imposed by the enforcement action in
6 the investigation itself. In an optimal world we will
7 expect theft to happen because we cannot prevent all
8 theft. If we tried to do that --

9 CHAIRMAN KOVACIC: You would be out of your
10 mind.

11 MS. SANDERSON: -- the resources expended would
12 far exceed what the benefits would be at the end of the
13 day.

14 MR. DAMTOFT: Can I ask a question on the
15 comparative subject? One perspective that people in this
16 room have is a benchmark of another system, which is well
17 thought of in many quarters. Can you tell us what
18 lessons we can draw from the Canadian experience that
19 would be useful. In doing that I don't want to open this
20 up as a free-for-all on the Bureau, but really what
21 lessons are learned that we could bring down to our side?

22 MR. BALDANZA: This is perhaps not directly
23 responsive to your question, but the issue of competitive
24 impact submissions, you don't use that format in the U.S.
25 It is used in Europe, it is used in Canada. It seems to

1 me that it is very helpful to the agency hearing what the
2 parties have to say about why the transaction is not
3 anti-competitive. It is an odd thing, it seems to me,
4 not to want to hear that story except when you are well
5 down the enforcement pike.

6 CHAIRMAN KOVACIC: I think, Tony, a basic
7 question that annexed -- they are a package of concerns
8 associated with whether the guidelines need to be
9 retooled, how the process has to be changed, but I think
10 a basic question about whether the forms we request, the
11 type of information we ask for at the beginning, ought to
12 be fundamentally rethought with these illustrations as
13 benchmarks is an enormously important one coming up, and
14 ought we to adopt something like the Canadian practice,
15 the European practice on that point.

16 MR. BODRUG: But that is largely a result of
17 private practice. Our form does not require a
18 competitive impact analysis; that is just what we do in
19 practice because we find it to be effective. There is
20 nothing preventing other jurisdictions from adopting such
21 a practice -- you don't need to change your forms to
22 permit voluntary submissions --

23 MR. BALDANZA: It is more than that because we
24 actually have policies that make it clear that that is
25 what is expected in order for certain service standards

1 to be triggered.

2 MR. BODRUG: You can comply with that policy
3 without giving the level of substantive submission that
4 has become the practice in Canada.

5 MR. CRAMPTON: It is probably fair to say that
6 a lot of us up here are not feeling very good about how
7 our system is becoming more litigious. I have heard many
8 people say that it is bringing us closer to the U.S.
9 approach. We really do not like the fact that our system
10 is moving that way. I think that might get to your
11 question in a slightly different way. You asked what you
12 can learn from our experience. Cal, when he was
13 Commissioner, had what he called his "open-door
14 compliance" approach. I think many of us feel that that
15 worked well. Yes, every once in a while the system got
16 abused, but more or less it worked well, and we have
17 misgivings about how the system here is becoming more
18 litigious. I think a lot of us, if we had our druthers,
19 would do what we could to avoid going further down that
20 path.

21 MR. BODRUG: When you say "litigious" I think
22 you are talking about the back-and-forth dialogue between
23 the Bureau and counsel during the course of the merger
24 review, which, to my impression is becoming more
25 formalistic and less informative in Canada.

1 MS. SANDERSON: I think it is more about --
2 what happens is people get locked in and then they
3 actually stop communicating with each other. My pet
4 peeve is that I cannot talk to economists directly any
5 more because I have to talk to someone at the Department
6 of Justice who then will not even tell me if there is an
7 economist or there is not an economist. Look, if you
8 guys would just let us talk to each other, we could each
9 work with the same data; we could figure it out; and if I
10 am on the party's side, I can say: This is what they're
11 doing; I do the same thing; I get the same answer. Go
12 and talk to them about what you are going to sell,
13 instead of persisting in...

14 It is not that people are not happy to have a
15 fight or debate. If you went to the merger litigation
16 session this morning, you saw that our litigators are
17 excellent debaters and there is no problem in that
18 regard. It is more that it takes longer to get to the
19 outcome because people are not sharing information,
20 perhaps. I do not know if that is the nub or if it is
21 something different.

22 MR. CRAMPTON: I have heard Cal wax eloquently
23 about this.

24 Cal, we were just talking about the open-door,
25 compliance-oriented approach that you instituted.

1 MR. GOLDMAN: It worked for a while.

2 MR. CRAMPTON: It worked, but I think a lot of
3 us have some misgivings about the trend towards a more
4 litigious approach that I guess people tend to associate
5 with how things are done in the U.S. I do not know
6 whether you have thoughts on that and can elaborate.

7 MR. GOLDMAN: It was an ideal world for a
8 period of time where the business community was assured
9 that if they attended on the Bureau with full and frank
10 disclosure of the pros, the cons, the relevant facts and
11 documents, the Bureau would be as full and frank in
12 response and it would lead to as expeditious a decision
13 as at all possible. So come in right up front in your
14 initial brief with the kind of disclosure that, as it
15 evolved, many U.S. counsel said they were very concerned
16 about given that all that kind of information may lead to
17 second requests or may lead to issues if it moved from
18 the Canadian Bureau to the U.S. counterparts, and that
19 became a chill on the open and frank dialogue in Canada,
20 along with game playing that evolved because counsel tend
21 to hold back and advocate their clients' interests.

22 So it was an ideal world that perhaps could
23 exist in another dimension, but it does, I believe, still
24 commend itself to the goal of expeditious review of
25 transactions, so that if there were an idyllic system

1 that said: You two parties and you third parties that
2 have issues have to put everything, pro and con, on the
3 table within two weeks of the announcement, and you are
4 penalized if you don't, and the government has to put its
5 cards on the table as well, you would probably get to a
6 similar decision much earlier, and the people proposing
7 the merger would at least know where they stood at an
8 earlier time.

9 I agree with you, Bill. In merger cases,
10 getting the process right is as important as the
11 substance of criteria. The decision can be governed by
12 process in merger cases much more than others. It may
13 not even get to the substance if the process is wrong.

14 MR. BALDANZA: First, I do not think in today's
15 climate people will drop all their drawers. Second,
16 there was less transparency in that era than there is
17 today. If you would like to hear one positive thing that
18 we are saying, the technical backgrounders that the
19 Bureau is issuing are, I think, enormously helpful. We
20 need to see more of them because so many cases do not
21 result in litigated results in this jurisdiction that we
22 have a dearth of guidance until the backgrounders come
23 through.

24 MR. DAMTOFT: I had a conversation with one of
25 your number in the hallway, who was not able to be here,

1 who said one thing we should think about emulating is
2 your Advance Ruling Certificate approach. I wonder if
3 you think that is something we ought to look at.

4 MR. CRAMPTON: It is the up-front comfort.
5 There are two forms of it; there is the Advance Ruling
6 Certificates, which you do not really get any more when
7 you need them, and you never really did unless it was a
8 real "no brainer," and then there are what we call "no
9 action" letters. The Bureau now has a history, over
10 almost 20 years, of never having gone back and challenged
11 a transaction in respect of which it gave a "no action"
12 letter. So those are worth their weight in gold. People
13 tend to want them. People tend to cooperate and bend
14 over backwards to do what they have to do to get them.
15 Purchasers and their lenders typically insist on them in
16 deals. You do not find people rushing to close and then
17 fighting in the vast majority of cases.

18 MR. KENNISH: It enables you to have a more
19 informal presentation of the story of that merger and
20 possibly get it considered more expeditiously. You get a
21 higher level of reliable advice, because we can still
22 challenge mergers for three years even with a clearance.
23 But now with the Advance Ruling Certificate, that blocks
24 the Commissioner from taking action if they have given a
25 clearance on that basis.

1 However, the practical fact is they only issue
2 them in the kind of transactions where you don't need
3 them. So apart from the sort of informality of the
4 process, I don't think you get a great deal out of it.

5 In addition, there is some uncertainty as to
6 whether it is going to be treated on that basis, and
7 people end up filing a full set of documents just to make
8 sure that, on a fallback basis, they have the statutory
9 information and can deal with it as a regular no action
10 letter.

11 MR. GOLDMAN: One thing, though, I hope
12 everyone here on the Canadian would agree that the one
13 step we took which was advantageous, and has still proven
14 to be advantageous, especially when we are not tied up by
15 U.S.-Canada concerns that are legitimate -- U.S. counsel
16 practice in a somewhat different manner with the risk of
17 second request and the historical avoidance among many
18 firms of too much in writing too early in their
19 submission to the authorities.

20 We in Canada, on a Canadian-made-only
21 transaction, do not have the same hesitation of filing a
22 brief, a White Paper, and putting out a position up front
23 to try to move it along, and more often than not our U.S.
24 counterparts are holding us back from doing the same
25 thing, for a good reason, because of the difference in

1 practice.

2 If we converge toward a second request model,
3 maybe it will take away from the merits of an early White
4 Paper, but I for one think that it does accomplish, and
5 can accomplish, a great deal in getting the authority,
6 the agency, up to speed early. If the entities that are
7 doing it have retained economists and can delineate the
8 market and respective issues and so on on a quantitative
9 and qualitative basis, things move along faster. They do
10 this in Europe, as you know, more often. It is just
11 something you might want to give some thought to, how to
12 encourage that kind of candid, up front disclosure by
13 parties to a merger that will be done simultaneously in
14 each jurisdiction in transborder cases.

15 CHAIRMAN KOVACIC: The last area, one that we
16 have touched on some that I would like to turn back to,
17 is what we can do more effectively in the international
18 sphere. One line of commentary that appears sometimes is
19 that the influence of the U.S. as a jurisdiction is
20 declining, that Europe is ascending, that other
21 authorities, for a variety of reasons, are doing
22 different things. That is not inherently unsettling to
23 me unless one proceeds with the assumption that the world
24 competition order is right only if U.S. preferences are
25 the standard universally. That has always struck me as a

1 relatively hegemonistic perspective on the appropriate
2 order of things.

3 Maybe a more sophisticated question is whether
4 there are areas in which we ought to be exercising
5 influence in the deliberations of different groups that
6 we do not. Are there activities in which we do not
7 participate sufficiently, either in the more microscopic
8 example of our relationship in North America with Canada
9 -- set aside our other NAFTA partner, Mexico, for a
10 moment -- or in other international organizations with
11 which you are all familiar?

12 If I were to propose to you the larger question
13 about the adequacy of our international program, what
14 would you add to the mix of things we are doing, if you
15 were our personal trainers? What would you do
16 differently at the larger global level or, more narrowly,
17 at the bilateral level?

18 MR. GOLDMAN: I've got to run, I'm late for
19 something, so I'll just give two thoughts and then, I'm
20 sorry, I have got to go.

21 Number one, the FTC and the DOJ could very
22 constructively share with other jurisdictions the manner
23 in which you have been able to achieve the kind of
24 constructive, ongoing working relationship with the
25 section of antitrust law and other legal bodies in the

1 private sector. The flow of ideas and the debate in a
2 healthy, vibrant manner that goes on at the section which
3 I am most familiar with, but I have seen other circles
4 like the USCIB and so on, between government persons and
5 private sector persons is something that is really a huge
6 accomplishment.

7 We don't have as nice a bridge in Canada. I
8 know some in the Bureau feel that and some in the private
9 sector have felt it in recent years. And it is
10 certainly, as I am sure you are well aware, does not
11 exist in some parts of Europe and other parts of the
12 world. How that has been achieved and the catalyst and
13 the platforms and the experience to get there would be
14 exceptionally constructive because there is not the same
15 degree of private-public sector interchange and
16 constructive dialogue. They sit in vacuums by and large.
17 I am generalizing, but I have heard this time and time
18 again.

19 Secondly, involving the business entities in
20 the private sector in other parts of the world, which are
21 involved heavily as stakeholders in the Canadian system
22 and in the U.S. system -- organizations, chambers of
23 commerce, USCIB and so on -- does not take place to the
24 same extent, and not just the bar. I am talking about
25 the input of the major private sector entities in

1 organizational terms, not just domestic, but again if we
2 are going to see the OECD -- the OECD has BIAC trying to
3 accomplish this -- but ICN, I think it has been widely
4 accepted now that the ICN needs to get more business
5 entities involved in contribution toward its programs.
6 From the range of South Africa through to newly
7 industrialized nations across the globe, encouraging them
8 to bring business entities into the debates and
9 discussions, I think would be a terrific accomplishment,
10 and sharing the experience of the FTC in those two areas
11 would be very constructive.

12 Thank you.

13 CHAIRMAN KOVACIC: Thank you, Cal.

14 MR. KENNISH: On the international side, there
15 are two forces here delineating the future. One is the
16 internationalization of business means that there are
17 more players whose conduct will be reviewed -- the same
18 kind of conduct or transactions, in multiple
19 jurisdictions. And we have the emergence of national
20 enforcement agencies who have ambitious agendas and
21 jurisdictions such that not just in the matters you
22 currently are involved with, merger review and cartel
23 cooperation and so on, but I suspect in single-actor
24 matters and so on, you will have an interest in perhaps
25 taking account of what other jurisdictions are thinking

1 about in regard to the same things.

2 I just see that that is enlarging over time.
3 It will just get more and more complicated, and I would
4 think a leadership initiative on your part, both to
5 engage the other parties that have possible interest to
6 make sure that everybody understands the views of the
7 various parties would be good.

8 Secondly, I think you are in a wonderful
9 position to lead less experienced countries and agencies
10 to the right conclusions on things and to develop
11 policies that are more likely to get them to the right
12 place over time, and you have that international
13 reputation that engenders respect. You have the
14 experience and knowledge of having done it. You are
15 already involved in an outreach, but I think as a
16 practical matter it will be beneficial for you to
17 facilitate more of this international collaboration.

18 MS. SANDERSON: Have you ever thought of joint
19 research activities with other agencies, for example?
20 You might imagine that. The FTC is in a unique position
21 relative to justice for staff exchanges as well. You are
22 the only agency you can do that with, because you can't
23 work in the U.S. Justice Department without being a U.S.
24 citizen. There might occasionally be people around who
25 have joint citizenship, but for purposes of staff

1 exchanges and that type of thing, the FTC is certainly
2 the place to be. That, I think, can be very valuable for
3 influencing how people go about reviewing cases; what
4 matters, what doesn't matter.

5 Certainly the Bureau benefitted greatly by
6 having people from the FTC in the organization advising
7 on things, and it is nice if that can be somebody that is
8 reasonably close to whatever the version of the front
9 office is as opposed to being -- we have had lots of
10 exchanges with Australia, but I don't know how much
11 knowledge gets transferred from those because sometimes
12 it is a case officer who is fairly deep in the
13 organization; they go down to Australia, they have a
14 great year, they work on cases, they come back, and it is
15 a little hard to know whether much gets disseminated from
16 that experience.

17 MR. CRAMPTON: You need somebody at a higher
18 level.

19 CHAIRMAN KOVACIC: Margaret, do you think there
20 would be benefit in the economic units of some of the
21 different agencies formulating something that looked like
22 a common research program?

23 MS. SANDERSON: I think that would be
24 excellent. I think there is a lot to be done about
25 sharing the research that is already done, even in the

1 context of just informing people, you know, there is a
2 new working paper out, or having those parties
3 participate in the workshops that happen for purposes of
4 presenting those papers and that research. You can
5 imagine that you could do quite a lot in the context of
6 sharing the research that already happened.

7 Jointly, the one thing that is missing often in
8 the academic sphere is that the academics don't know what
9 would be of value to the enforcement agency to have
10 explored in terms of empirical testing of certain
11 principles and things that we apply on a day-to-day basis
12 that we think work, more or less, to have those tested.
13 You can imagine doing that. That can easily be done in
14 the context of joint research or something.

15 CHAIRMAN KOVACIC: I am trying to recall; is it
16 indeed going to be in Canada there is going to be a first
17 conference of the chief economists later this year?

18 MR. KENNISH: It is going to be up here, yes.

19 MS. SANDERSON: That is a great forum to start
20 that.

21 MR. CRAMPTON: In terms of the things that I
22 think you could be doing better, only because you ask,
23 because I really do think that you guys are very much
24 best in class internationally, it would be wonderful if
25 you could do more TA. I know you do probably more TA

1 than anybody else, with the possible exception of DG-
2 COMP, but there is a huge need out there for TA right
3 now.

4 The field is open for somebody to take
5 international leadership in terms of promoting a greater
6 understanding within the political and development
7 communities of the links between competition and economic
8 development, whether it is links between competition and
9 poverty alleviation; links between competition and
10 health, education, investment, trade, and regulatory
11 reform. There are strong links that are not understood,
12 that are not appreciated. I think that funding for more
13 technical assistance would be forthcoming if those links
14 were better understood by the aid agencies and others in
15 government.

16 I think that there is a need for more
17 international leadership from somebody, and why not you
18 guys, in the areas of market manipulation of global
19 commodity markets, the IP antitrust interface, the merger
20 area -- namely coordinated and unilateral effects.
21 People are struggling with how to bring and win cases,
22 especially in dynamic markets, as we saw in Oracle.
23 There is also a need for more leadership in the area of
24 facilitating practices.

25 CHAIRMAN KOVACIC: Good list.

1 MR. BALDANZA: Paul's list was so comprehensive
2 it has covered some of the items I had. The one thing,
3 back to process, that I would suggest is that the United
4 States -- and I think Cal alluded to this -- has mastered
5 the existence of an interchange between the private
6 sector and the public, and in particular what I am
7 thinking of is the movement between the agencies and the
8 practicing bar, for example. We don't have anything
9 approaching that in Canada, and to the extent you have
10 special insights as to why that works there and might
11 work here -- and I wouldn't confine it to Canada, but I
12 think it adds immeasurably to an understanding and the
13 effectiveness of enforcement. I think it would reduce
14 some of the unnecessary friction we sometimes see at this
15 end of the border.

16 Something perhaps trivial, but there may be
17 scope, just as we have MLATs and we have cooperation
18 agreements that are more or less standard form around the
19 world, we may be able to move to a consensus notification
20 process. You may start with a small bite and take a
21 NAFTA approach, look for a common NAFTA approach to
22 merger notification. That may not be good for the
23 Canadian bar; my colleagues are choking on this one. If
24 you ask business people whether that would be good, I
25 would suspect that they would endorse it.

1 That doesn't mean migration to the U.S. model;
2 it is really a compromise model.

3 CHAIRMAN KOVACIC: I know we have stolen lots
4 of your time this afternoon. These are enormously
5 helpful suggestions. I cannot tell you how valuable this
6 is to us. It is a fantastic collection of insights in a
7 very short period of time with respect to everything we
8 explored. I suppose if we had a couple more weeks we
9 could dive into some of these things in the detail they
10 deserve. For all the reasons we wanted to do this, I am
11 delighted we did. Your thoughts are so useful and
12 constructive. It holds up a great mirror for us to think
13 about what we might do. We are all delighted with the
14 Canadian Bar Association for making the facility
15 available to us, for putting this together, and for your
16 considerable efforts to make this a success. We will do
17 our best to make sure that you see good results from this
18 in the future.

19 I would say one other thing along the lines we
20 have just been mentioning, some of these last
21 observations; Tony's thoughts about the significance of
22 the revolving door, Cal's suggestions about the
23 relationship between the agencies and non-government
24 organizations, professional societies outside their
25 borders, Margaret's comment about links with

1 universities. Something we thought of is how we might
2 greatly strengthen the ties that we have with the
3 academic community overseas in our own borders to better
4 integrate their research agendas with our own. Not that
5 we are going to tell them what to do, but to at least
6 give them an indication of what is interesting to us and
7 perhaps learn better about what is going on with them.

8 Just to pick another thing off the list of
9 things we have been talking about, I think Tim's comments
10 about the basic structure of the U.S. system are also
11 profoundly important. I wonder, when you look at things
12 that are happening in other jurisdictions, for example,
13 France is on the verge of simplifying its federal
14 structure. Brazil is highly likely to go from three at
15 least to two, and maybe some day to one. The
16 international trend is not to build multiplicity into the
17 structure. Either there is going to be some
18 consideration of rationalization, because the
19 conventional easy answer to the question of what is going
20 to happen is to say it is immutable and therefore not
21 worth our conversation any more than thinking of what
22 would happen if the earth were somewhere beyond Saturn.
23 It is not. I am not sure that it is completely
24 immutable, but if it were, I think the further question
25 is, assume that we are going to have two federal

1 antitrust agencies, a host of sectoral agencies with
2 overlapping authority, 50 state bodies, private rights of
3 action with powerful consequences, and who knows what
4 else. Assuming that is the fact of life for the
5 indefinite future, what might be done to rationalize it
6 in some way?

7 I have often thought, do we need a domestic
8 equivalent of the ICN at least to provide a mechanism for
9 all these people to talk to each other more frequently so
10 that there are consistent norms? That does not exist
11 now. We expend far more effort trying to achieve
12 convergence, interoperability with our foreign
13 counterparts than we do with the domestic community. We
14 do not have the European Competition Network equivalent.
15 We probably spend far more time dealing with our
16 principal foreign counterparts than we do with our
17 domestic counterparts. That might be seen as a gap, so
18 to focus maybe in a more thoughtful way about if we
19 accept the status quo as unchangeable, do we shrug and
20 say all of the anomalies that come from it also cannot be
21 adjusted, or to do something more about it?

22 Just a handful of observations that you have
23 made that are extremely helpful to us. We are very
24 grateful. I see this as a way of making us better over
25 time, and my larger hope is that this is something we

1 will not simply do every century. I would like to see
2 this be something that we do maybe every five years or so
3 in the tradition of some of the other national
4 authorities and regional authorities that I think have
5 really picked up on the idea that if you are not
6 regenerating yourself on a regular basis, you are falling
7 behind.

8 Thank you for making this a most useful
9 exercise for us.

10 MR. DAMTOFT: This is not the last word. If
11 people have additional thoughts -- we hardly had enough
12 time to get everything out there -- we would be happy to
13 have additional comments in writing. I know we had one
14 person join us at the last moment who never had a chance
15 to open his mouth. We would really be happy to hear more
16 from you.

17 (Whereupon at 5:30 p.m., the hearing was
18 concluded.)

19
20
21
22
23
24
25

C E R T I F I C A T I O N O F R E P O R T E R

CASE TITLE: THE FEDERAL TRADE COMMISSION AT 100

DATE: SEPTEMBER 18, 2008

I HEREBY CERTIFY THAT the foregoing was taken
in stenograph and transcribed therefrom to the best of my
skill and ability.

Lillian C. Purdy, C.S.R.